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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, PETITIONER

v.

F. W. PITTS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of William B. Camp, Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 463 F. 2d 632. The opinion of the district court (App. B, *infra*) is reported at 329 F. Supp. 1302.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on June 28, 1972. On August 30, 1972, the court denied a timely petition for rehearing (App. D, *infra*). On November 20, 1972, the Chief

Justice extended until December 12, 1972, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals, after finding that the Comptroller's stated reasons for denying a national bank charter did not provide an adequate basis for judicial review, erred in remanding the case to the district court for a trial *de novo* rather than for a further statement of reasons by the Comptroller.

STATUTES INVOLVED

The relevant provisions of the National Bank Act, 12 U.S.C. 21, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 500–706, are set forth in Appendix E, *infra*.

STATEMENT

Respondents brought this action for judicial review of the Comptroller of the Currency's denial of their application of August 1967 for a charter, pursuant to the National Bank Act, 12 U.S.C. 21, *et seq.*, for a new national bank in Hartsville, South Carolina (App. B, at 20).

A. THE COMPTROLLER'S DECISION

The applicants submitted detailed biographical, financial and economic data in support of their application, and a national bank examiner conducted a full field investigation (App. B, at 20). Upon notification of the application, the South Carolina Board of Bank

Control, several banks and businessmen in the area, and an officer of the Federal Reserve Bank in Richmond submitted comments and information to the Comptroller (*e.g.*, R. 350–360; A. 153).[1] On April 15, 1968, after review of the investigating examiner's report and all the information submitted in connection with the application, the Comptroller decided against approval and so notified the applicants, stating that "we have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable" (A. 18).[2]

In May 1969, the applicants sought reconsideration of their appplication on the basis of additional information they had submitted to the Comptroller (A. 19). The applicants, who did not request a formal hearing pursuant to 12 C.F.R. (1967 rev.) 4.12(d), met with the Regional Administrator of National Banks to discuss in detail the various aspects of their application and the Comptroller directed a national bank examiner to conduct a new field investigation and submit a detailed report (A. 131, 133).

The reports of the national bank examiner and the Regional Administrator, and the other information before the Comptroller, including information submitted by the applicants and other area banks, and the earlier field investigation report, indicated the following: The City of Hartsville has a population

[1] "R." refers to the administrative record, which was filed in the district court and which we are lodging with the Clerk of this Court.

[2] "A." refers to the Appendix in the court of appeals, a copy of which we are filing with the Clerk of this Court.

of about 8,500 and is surrounded by a largely agricultural area (A. 133). The city's population derives its income primarily from several industries, the largest of which is Sonoco Products Company employing sixty percent of the work force. The financial needs of this area are presently served by two commercial banks, two savings and loan associations, and one large credit union; these financial institutions are located within one-half mile of the site proposed for the new bank and in 1969 had combined deposits of more than $40 million (A. 135). The Chief Examiner for the South Carolina Board of Bank Control stated that the community's future economic prospects indicated that a new bank would not be successful (A. 153) and the First Vice President of the Federal Reserve Bank of Richmond commented that another bank might create an "over-bank[ed]" condition in the community (R. 360).

The examiner who conducted the investigation of the original application and the examiner who investigated the application on reconsideration, after conducting thorough, independent investigations, both concluded that the new bank would have difficulty getting started and might never become profitable. Both examiners recommended denial of the charter (A. 133–138, 139–152) and the Regional Director of National Banks concurred for similar reasons (A. 131–132, 152).

On the basis of the information and analyses in the reports from his staff and upon all the evidence before him, on July 29, 1969, the Comptroller denied

the application on reconsideration. The Comptroller wrote the applicants as follows:

> We have carefully considered the various material developed in connection with the reconsideration of an application for a new National bank at Hartsville, South Carolina, filed by you and your associates. This review included all of the material submitted by you at various times since the disapproval of the application in April of 1968, as well as the material developed during the course of the most recent field investigation by a National Bank Examiner.
>
> You and the members of the group would be less than human not to feel strongly on this question which is of such importance to you. On each application we endeavor to develop the need and convenience factors in conjunction with all other banking factors and in this case we were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served by the Peoples Bank with deposits of $7.2MM, The Bank of Hartsville with deposits of $12.8MM, The First Federal Savings and Loan Association with deposits of $5.4MM, The Mutual Savings and Loan Association with deposits of $8.2MM and the Sonoco Employees Credit Union with deposits of $6.5MM. The aforementioned are as of December 31, 1968.
>
> It was a difficult case and you and your associates certainly presented your side of the case with fairness and diligence. We are unable to find any basis to change the decision as rendered. All we can say to you is that we did give this matter the most meticulous consideration and reached a conclusion contrary to what you had sought.

B. THE DECISIONS BELOW

On November 17, 1969, respondent-applicants brought this action in the district court seeking judicial review of the Comptroller's denial of their application for a charter. After considering the extensive administrative record upon which the Comptroller had based his decision and the explanation in his letters to the applicants,[3] the court granted summary judgment in favor of the Comptroller, concluding that "there is substantial basis for [the Comptroller's] determination and that it was neither capricious nor arbitrary" (App. B, at 29).

The court of appeals reversed, holding that for the purpose of judicial review the Comptroller had not given a sufficient statement of the reasons for his action (App. A, at 17). The court pointed to the Comptroller's two letters to the applicants denying their application and found these inadequate because the Comptroller had not explained what considerations were involved in determining a community's need for additional banking facilities (App. A, at 20).[4] Accordingly, the court determined that "upon review, we cannot distinguish what specific factors were considered by the Comptroller, nor whether in denying

[3] The Comptroller filed an affidavit in the district court explaining the reasons for his denial of the application (A. 6–10). The district court, however, relied only on the Comptroller's letters to the applicants (App. B, at 26 n. 3).

[4] The court of appeals did not refer to the Comptroller's explanation for his action contained in his affadavit filed in the district court, see note 3, *supra*.

the application he acted within permissible bounds of discretion" (*ibid.*).

After thus concluding that the judgment below should be vacated, the court held that the case should be remanded "for a trial de novo before the District Court rather than to the Comptroller for further consideration" because the Comptroller's letters to the applicants after his initial decision and after reconsideration "inadequately and inarticulately resolved [their] presentation" (*id.* at 17.) The court specified the procedure to be followed in this trial *de novo:* the applicants will open the trial with proof that they had complied with the formal requirements of filing an application and may present "any other relevant evidence"; the Comptroller and "intervenors manifesting opposition, if any, to the new bank" may then testify. The district court will then make its own findings of fact and, on the basis of these findings and its conclusions of law, will determine whether the Comptroller's denial of a charter was capricious or an abuse of discretion. (*Id.* at 18.)[5]

REASONS FOR GRANTING THE WRIT

The court of appeals has required a trial *de novo* with respect to matters determined by the Comptroller on the basis of a comprehensive administrative record, a copy of which the Comptroller filed in the district court. This exceptional and disruptive method of judi-

[5] The court of appeals cited its decision in *First National Bank of Smithfield* v. *Saxon*, 352 F. 2d 267, 271–272 (C.A. 4).

cial review will seriously hamper effective administration of the National Bank Act [6] and has important implications for the considerable number of banking cases in the federal courts.[7] In remanding this case for a trial *de novo,* the court below has acted directly contrary to this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415–421, with respect to the proper procedure for judicial review of informal agency action.

The court below was also in error, we submit, in the portion of its opinion holding that the Comptroller's statement of reasons for his denial of respondents' charter application, together with the administrative record, provided an inadequate basis for judicial review. Similarly, that the Comptroller must make formal findings contemporaneously with his decision to approve or deny a charter is in error, in our view, as we discuss below. See *Sterling National Bank* v. *Camp,* 431 F. 2d 514 (C.A. 5), certiorari denied, 401 U.S. 925. However, the court's opinion may be viewed as holding only that in this case the court did not have a sufficient indication of the reasons for the Comptroller's denial to enable it effectively to review his action, see *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401

[6] In 1971, 185 new bank applications and 1157 branch bank applications were filed with the Comptroller; in the same year, a total of 22 cases involving the Comptroller's action on such applications were pending in the federal courts. *1971 Annual Report of the Comptroller of the Currency,* 7, 11, 15–16.

[7] The Federal Home Loan Bank Board, which passes upon applications for charters and branches of Federal savings and loan associations pursuant to 12 U.S.C. 1461–1468, has informed us that it also considers the decision below erroneous and deleterious to the effective administration of these statutory provisions.

U.S. at 417–421, and our disagreement with this aspect of the court's holding would thus involve merely the question whether the Comptroller's statements in light of the administrative record were adequate in the circumstances of the instant case.[8] In this Court we have therefore not challenged the decision of the court of appeals in this regard and raise only the important question whether, assuming the court correctly determined that the Comptroller's explanation was insufficient, the court nevertheless erred in remanding for a trial *de novo*.

As we stated above, with respect to the trial *de novo* issue *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 415–421, which the court below did not mention,[9] is directly on point. This Court there held that *de novo* review of agency action is authorized under Section 706(2) of the Administrative Procedure Act[10]—the provision cited by the court below (App. A, at 15)—in only two circumstances (neither of which were mentioned by the court below): (1) "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate"; and

[8] This was a relatively simple case and the explanation contained in the Comptroller's letter to the applicants upon reconsideration was straightforward: the need factor had not been satisfied in light of the financial institutions already serving this small community (see p. 5 *supra*). Other courts of appeals have had no difficulty in reviewing the Comptroller's action in light of administrative records similar to that in the instant case. See *e.g.*, *Sterling National Bank* v. *Camp*, *supra*; *Warren Bank* v. *Camp*, 356 F. 2d 52 (C.A. 6).

[9] The Comptroller relied upon *Overton Park* in his brief before the court of appeals, at p. 31.

[10] 5 U.S.C. 706(2).

(2) "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." 401 U.S. at 415. As in *Overton Park*, "[n]either situation exists here." *Ibid.*

Although we do not believe that the Comptroller's action in this case was adjudicatory in nature, the first basis for *de novo* review is inapplicable in any event because, in light of the thorough and extensive administrative record, there cannot be a tenable claim here that the Comptroller's factfinding procedures were inadequate. As to the second ground stated in *Overton Park*, this is likewise not present since the applicants' suit for judicial review obviously is not a proceeding to enforce the Comptroller's decision.[11]

Thus *de novo* review is not authorized in this case. And as in *Overton Park* where this Court reached the same conclusion, there is no requirement that the Comptroller make formal findings when he denies a charter since "the Administrative Procedure Act requirements [5 U.S.C. 553 (a)(2), 554(a)] that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply * * * here." 401 U.S. at 417. Those APA requirements pertain only to rulemaking and cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *." 5 U.S.C. 554(a). There is no such statute with respect to the Comptroller's consideration of charter applications; and Section 27 of the National Bank Act, 12 U.S.C. 27, indicates that the Comptroller is to gather his information through less formal methods, such as the reports from the ap-

[11] In any event, no new issues regarding the applicants' qualification for a bank charter were raised in court.

plicants and the Comptroller's staff that are part of the administrative record here.[12]

This leaves only the question of what procedures a court should follow in a case such as this, where formal findings are not required and have not been made, where *de novo* review is not authorized, and where the appellate court concludes that there cannot be effective review of the agency's decision without a further explanation regarding the reasons for the agency's actions. *Overton Park* holds that in these circumstances the proper disposition is to remand the case to the district court in order to allow it to consider "the administrative record"[13] and to require, when the record does not disclose the factors considered by the agency, "some explanation in order to determine if the [Comptroller] acted within the scope of his authority and if the [Comptroller's] action was justifiable under the applicable standard." 401 U.S. at 420.[14]

---

[12] Section 27 provides that the Comptroller may base his decision to grant or deny a bank charter on the evidence "reported" by the applicants and on "any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him * * * *or otherwise* * * *" (emphasis added). See *Sterling National Bank* v. *Camp*, *supra*, 431 F. 2d at 516–517.

[13] In this case the district court had the entire administrative record before it when it granted the Comptroller's motion for summary judgment.

[14] The Court in *Overton Park* suggested two ways of seeking such an explanation: calling the responsible agency official to testify or having the official submit findings "that will provide an adequate explanation for his action." 401 U.S. at 420.

In view of the holding of the court below that the Comptroller had not supplied a sufficient explanation of what was

Thus, even assuming *arguendo* that the court of appeals correctly determined that the administrative record and the Comptroller's statements did not adequately explain the reasons for his denial of the charter, the court below nevertheless erred in ordering a trial *de novo,* which the APA did not authorize, instead of following the procedure outlined in *Overton Park.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys.

DECEMBER 1972.

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embraced in the concept of "need" (App. A, at 17), a submission by the Comptroller upon remand giving such an explanation would appear to be adequate.

APPENDIX A

United States Court of Appeals
for the Fourth Circuit

No. 71-1965

F. W. PITTS, G. GRAHAM SEGARS, MARION M. GANDY, ROBERT K. BASS, WALTER G. WOFFORD, GUS HOFFMEYER, A. R. MIMS, GEORGE L. TIMMONS, A. T. J. MORRISON, HARRELL L. GARDNER, AND EDWARD E. SALEEBY, PROPOSED ORGANIZERS OF THE FIRST NATIONAL BANK OF HARTSVILLE, A NATIONAL BANKING ASSOCIATION IN THE PROCESS OF FORMATION, APPELLANTS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT FLORENCE. ROBERT W. HEMPHILL, DISTRICT JUDGE

(Argued March 7, 1972; Decided June 28, 1972.)

Before BRYAN, BUTZNER, AND FIELD, *Circuit Judges.*

BENNY R. GREER (GREER and CHANDLER on brief) *for Appellants,* and WALTER H. FLEISCHER, Attorney, Department of Justice, (L. PATRICK GRAY, III, Assistant Attorney General, STANTON R. KOPPEL and ROBERT E. KOPP, Attorneys, Department of Justice, and JOHN K. GRISSO, United States Attorney, and WISTAR D. STUCKEY, Assistant United States Attorney, on brief) *for Appellee*

ALBERT V. BRYAN, *Circuit Judge:*

An application for the organization of The First National Bank of Hartsville, South Carolina, was filed by F. W. Pitts and others with the Comptroller of the Currency in August 1967, under the provisions of the laws of the United States, 12 USC 21–27.[1] The request was rejected originally on April 15, 1968, and upon reconsideration on July 29, 1969. The soul of the Comptroller's decision was that "we were unable to reach a favorable conclusion as to the *need* factor". (Accent added.) The determination was stated in letters from the Comptroller to the applicants' attorney.

Concededly, the application complied with all of the statute's essentials. On that basis, suit was brought in the District Court to compel the Comptroller to grant the bank charter. No evidence was taken, decision going for the Comptroller on his motion, with affidavits, for summary judgment. Appealing, the applicants attack the denial on the ground that no hearing was granted them by the Comptroller prior to his decision. Also,

---

[1] It is to be noted that this case involves the original establishment of a national bank, and not a question of allowing the creation of a branch to an existing institution. The latter is covered by 12 USC 36(c) and is the subject of the more frequent precedents, such for example as First-Citizens Bank & Trust Co. v. Camp, 409 F2d 1086 (4 Cir. 1969).

it is averred that his action was arbitrary and capricious, wholly without supporting proof. Lastly, the appellants assert that the need for a new bank is a factor beyond the Comptroller's scope of consideration.

The District Judge upheld the Comptroller, although he was doubtful that the statute "commits the determination of * * * need to the Comptroller's discretion". However, he was persuaded by the "long and continued practice of the Comptroller of considering the need of the community". Continuing he said, "Although acknowledging that the plaintiffs presented a convincing case in favor of establishment of their bank, the court cannot say that the conclusion of the Comptroller is not adequately supported under the substantial evidence rule."

It is unnecessary, we think, to discuss the separate assignments of error ascribed by the appellants to the District Court. This is because in itself the ruling of the Comptroller is unacceptable. It does not comply with the bare, fundamental principle of agency decision: that its basis must be stated. FTC v. Sperry & Hutchinson Co., 40 USLW 4241, 4246 (March 1, 1972). *Sperry* reiterated the precept of *SEC* v. *Chenery Corp.*, 318 US 80, 94 (1943), that "[t]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed. * * *" 40 USLW at 4246. Indeed, the review of the agency action, and relief from any error therein, assured by sections 10 (a), (b), and (e)(B) of the Administrative Procedure Act, 5 USC 702, 703 and 706(2), would be impossible without a statement of such grounds. That the judicial review provisions of the Act apply to the Comptroller is unmistakably written in Data Processing Service v. Camp, 397 US 150, 156–57 (1970).

Even a cursory reading of the Comptroller's pronouncement here exposes his failure to observe the insistence of the law that the ground of determination be avowed. To begin with, the first word of the charter's denial appears in this brief letter to plaintiffs' counsel:

> DEAR MR. HERRING:
>
> This will confirm our telegram of today's date regarding the application submitted by you and your associates to organize a National Bank at Hartsville, South Carolina.
>
> On the basis of information developed by our Field Investigation, together with all other pertinent data relating to the proposal, we have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable.
>
> We regret to inform you that the application has been disapproved.

The Comptroller's response to the request for reconsideration of his initial ruling was likewise embraced in a letter:

> We have carefully considered the various material developed in connection with the reconsideration of an application for a new National Bank at Hartsville, South Carolina, filed by you and your associates. This review included all of the material submitted by you at various times since the disapproval of the application in April of 1968, as well as the material developed during the course of the most recent field investigation by a National Bank Examiner.
>
> You and the members of the group would be less than human not to feel strongly on this question which is of such importance to you. On each application we endeavor to develop the need and convenience factors in conjunction with all other banking factors and in this case

> we were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served by the Peoples Bank with deposits of $7.2MM, The Bank of Hartsville with deposits of $12.8MM, The First Federal Savings and Loan Association with deposits of $5.4MM, The Mutual Savings and Loan Association with deposits of $8.2MM and the Sonoco Employees Credit Union with deposits of $6.5MM. The aforementioned are as of December 31, 1968.
>
> It was a difficult case and you and your associates certainly presented your side of the case with fairness and diligence. We are unable to find any basis to change the decision as rendered. All we can say to you is that we did give this matter the most meticulous consideration and reached a conclusion contrary to what you had sought.

Assuming that "need" is a factor to be considered in chartering a bank, obviously the Comptroller did not explain what was embraced in that concept. Questions immediately arising are, for example, whether the need is that of corporate or individual borrowers, local or non-resident depositors, mercantile or development capital, or the creation of desirable competition. Reasonably imaginable are other areas of pertinent consideration, untouched in the Comptroller's communications. Thus upon review, we cannot distinguish what specific factors were considered by the Comptroller, nor whether in denying the application he acted within permissible bounds of discretion.

Consequently we must vacate the judgment of the District Court. Since the Comptroller has twice inadequately and inarticulately resolved the appellant's presentation, we remand the cause for a trial de novo before the District Court rather than to the Comp-

troller for further consideration. The charter aspirants will open the trial with proof of their application and compliance with the statutory inquiries, and proffer of any other relevant evidence. Testimony may then be adduced by the Comptroller or intervenors manifesting opposition, if any, to the new bank. Thereupon the District Judge will determine, upon a statement of his findings of fact and conclusions of law, whether the appellants have shown by a preponderance of evidence that the Comptroller's ruling is capricious or an abuse of discretion. First Nat'l Bank of Smithfield v. Saxon, 352 F2d 267, 271–72 (4 Cir. 1965).

Vacated and Remanded.

APPENDIX B

In the District Court of the United States
for the District of South Carolina

Florence Division

(Civil Action No. 69-979)

F. W. PITTS, G. GRAHAM SEGARS, MARION M. GANDY, ROBERT K. BASS, WALTER G. WOFFORD, GUSS HOFFMEYER, A. R. MIMS, GEORGE L. TIMMONS, A. T. J. MORRISON, HARRELL L. GARDNER, AND EDWARD E. SALEEBY, PROPOSED ORGANIZERS OF THE FIRST NATIONAL BANK OF HARTSVILLE, A NATIONAL BANKING ASSOCIATION IN THE PROCESS OF FORMATION, PLAINTIFFS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, DEFENDANT

Before the United States District Court for the District of South Carolina, ROBERT W. HEMPHILL, *United States District Judge*

(Heard June 2, 1971; Decided August 17, 1971)

BENNY R. GREER, Esquire, of Messrs. GREER & CHANDLER, Darlington, South Carolina, *for Plaintiffs.*

JOSEPH O. ROGERS, Jr., Esquire, United States Attorney for the District of South Carolina, Columbia, South Carolina; WILLIAM D. RUCKELSHAUS, Esquire, Assistant Attorney General, Washington, D.C.; WISTAR D. STUCKEY, Esquire, Assistant United States Attorney for the District of South Carolina, Columbia, South Carolina; HARLAND F. LEATHERS, Esquire, and A. JAMES BARNES, Esquire, Department of Justice, Washington, D.C.; C. WESTBROOK MURPHY, Esquire, and JOHN E. SHOCKEY, Esquire, Office of the Comptroller of the Currency, Washington, D.C., *for Defendant.*

Filed August 17, 1971.

MILLER C. FOSTER, *Clerk.*

In August 1967, plaintiffs applied to the Comptroller of the Currency pursuant to 12 U.S.C. § 21, et seq. to organize a new bank in Hartsville, South Carolina. Plaintiffs, the organizers of the proposed new bank, filed information with the Comptroller and a field investigation was conducted by a national bank examiner. Based upon the file thus obtained, the Comptroller denied plaintiffs' application on April 15, 1968. Subsequent to the initial denial, plaintiffs submitted additional data and requested reconsideration by the Comptroller. The request for reconsideration was granted and a supplemental field examination was conducted. In July 1969 the Comptroller again denied plaintiffs' application. This action, whereby plaintiffs seek review of the decision of the Comptroller adverse to them, was commenced in November 1969.

Defendant moved to dismiss for want of jurisdiction of the subject matter, which motion was denied by the order of Judge Simons, October 19, 1970. At this point defendant has made the administrative file a part of the record in this case and moved for summary judg-

ment thereon. Plaintiffs have undertaken certain discovery to which defendant objects on the ground that, as this determination must be made upon the record before the Comptroller, it cannot lead to admissible evidence. Plaintiffs have also moved for summary judgment upon the administrative record pursuant to a theory hereinafter discussed.

The court has twice heard the argument of counsel, has considered the briefs of the parties and the administrative record. It appears to the court that discussion of the two legal arguments propounded by plaintiffs is largely dispositive of the issues presented.

First, in opposition to defendant's motion for summary judgment and in support of interrogatories served upon the defendant, plaintiffs argue that because the defendant did not hold a hearing on this application such additional information as plaintiffs may present must be considered by this court, in addition to the administrative file now a part of the record. Plaintiffs contend that if an adversary hearing is not held, they must be afforded the opportunity to build, whether by discovery or the taking of testimony, a record here, which additional record must be considered together with the administrative record in order that the court can make a *de novo* determination of the disputed facts. In this argument plaintiffs place their principal reliance upon *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267 (4th Cir. 1965). While that case involved a branch bank application rather than the present application for a new charter, it held that the court should provide a hearing and judge *de novo* the validity of the Comptroller's action, setting aside that determination if it constituted an abuse of the Comptroller's discretion.[1] As this court

[1] Judge Sobeloff in his dissent pointed out the inherent difficulty in the "de novo" review there authorized.

understands that opinion and the subsequent order of a district judge for North Carolina in *Bank of Haw River* v. *Saxon,* 257 F. Supp. 74 (M.D. N.C. 1966), the reason for the grant of a *de novo* hearing was the Comptroller's refusal to afford the aggrieved party a full and meaningful hearing. In this case no hearing was held, but plaintiffs did not demand or request such hearing. The regulations of the Comptroller provided in that regard:

> (d) Hearings. For purposes of this part, the Comptroller of the Currency, in his sole discretion, may, upon request of any interested person or otherwise, order a hearing, either public or private. Such hearing shall be held at the time and place fixed by the Comptroller and shall be conducted by the Comptroller or such other person as he may designate. The person conducting such hearing shall have authority to decide who shall appear as a witness therein, the order of appearance, what testimony, data, or other material or information shall be received in evidence, and all other procedural matters arising during the course of or otherwise connected with such hearing. No person shall become a party to any matter pending before the Comptroller solely by reason of being permitted to appear or to submit testimony, evidence, data, or other material at a hearing. A hearing ordered by the Comptroller is not required by statute and is not subject to the provisions of the Administrative Procedure Act. Nothing contained herein shall be deemed to require the holding of a hearing by the Comptroller on any matter. The validity of the Comptroller's determination in any matter shall not be affected because a hearing was not held, whether or not such a hearing was requested by any person, or because of the procedures adopted at such hearing. (12 C.F.R. § 412(d)).
>
> (e) Requiring information. For purposes of this part, the Comptroller of the Currency, in

> his sole discretion, may require any person, persons, bank, or banks submitting an application or request or any person, persons, bank or banks connected with the matter to which such application or request pertains, to submit such information, data, opinion of counsel, or other materials as may be specified by the Comptroller. Failure to comply with such demand of the Comptroller may be treated by him, in his sole discretion, as abandonment of the application or request to which the information, data, opinion of counsel, or other material relates (12 C.F.R. § 412(e)).

The Comptroller need not have granted any hearing in the matter (see, *Bank of Smithfield,* supra), and it appears from the regulation that such hearing, if granted, could have fallen short of providing plaintiffs with reasonable opportunity to present their case (see *Bank of Haw River,* supra). In either of those events the plaintiffs would be entitled to present evidence in this court. However, plaintiffs did not request a hearing. Neither the record nor the argument convince the court that plaintiffs regarded the procedure utilized by the defendant as unfair. It is the result of the procedure, the defendant's determination, by which they are aggrieved. At this stage the court cannot say that had plaintiff asked for a hearing that an adequate one would, or would not have been provided. Though plaintiffs did not have a right to a hearing before the Comptroller, they had a right and, if they sought to rely on the absence thereof, an obligation to request such hearing. In *First-Citizens Bank and Trust Co.* v. *Camp,* 409 F. 2d 1086 (4th Cir. 1969), the court stated of the bank complaining of procedural error:

> Its right to raise at the judicial level procedural objections not advanced before the administrative agency is suspect, because, ordinarily a litigant is not entitled to remain mute and

> await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible at the administrative level [at 1088, 1089]

This court, therefore, concludes that its determination must be made from its consideration of the administrative record. The discovery sought by plaintiffs cannot aid in that consideration even if it were otherwise proper.[2] Therefore, the record being complete, it appears that there is no reason to delay the grant of judgment in this case.

Plaintiffs' motion for summary judgment is upon the ground that the record shows that they met all the requirements of 12 U.S.C. § 21–27 and that as a result the statute required that the Comptroller issue the certificate. The Comptroller argues that the decision to issue the certificate is committed to his discretion and that the factors considered in making the decision are:

> (b) Investigation. The Comptroller of the Currency may conduct such investigation as he deems necessary or proper. Matters investigated include:
>
> (1) The adequacy of the proposed banks capital structure.
>
> (2) The earning prospects of the proposed bank.
>
> (3) The convenience and needs of the community to be served by the proposed bank.
>
> (4) The character and general standing in the community or the applicants, pro-

[2] See United States v. Morgan, 313 U.S. 409, 421–22 (1941) and Warren Bank v. Camp, 396 F.2d 52 (6th Cir. 1968), both of which indicate that questions similar to those contained in plaintiffs' interrogations are improper.

spective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.

(5) The banking ability and experience of proposed officers and other employees.

If the persons referred to in subparagraph (4) of this paragraph are not ready, within 30 days after filing of the application, to submit to and cooperate in the investigation, the Comptroller may treat the application as abandoned. [12 C.F.R. 4.2(b)]

In denying plaintiffs' initial application the defendant wrote:

> On the basis of information developed by our Field Investigation, together with all other pertinent data relating to the proposal, we have concluded that the factors in support of the establishment of a new National Bank in this area are not favorable.

And on reconsideration:

> You and the members of the group would be less than human not to feel strongly on this question which is of such importance to you. On each application we endeavor to develop the need and convenience factors in conjunction with all other banking factors and in this case we were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served by the Peoples Bank with deposits of $7.2MM, The Bank of Hartsville with deposits of $12.8MM, The First Federal Savings and Loan Association with deposits of $5.4MM, The Mutual Savings and Loan Association with deposits of $8.2MM and the Sonoco Employees Credit Union with deposits of $6.5MM. The aforementioned are as of December 31, 1968.
>
> It was a difficult case and you and your associates certainly presented your side of the

> case with fairness and diligence. We are unable to find any basis to change the decision as rendered. All we can say to you is that we did give this matter the most meticulous consideration and reached a conclusion contrary to what you had sought.

From these statements and the record before the court, it appears that the basis of the decision of the Comptroller was his unfavorable conclusion in regard to items 2 and 3 listed in the regulation set forth above.[3]

It is plaintiffs' contention that *need* of the new banking facility is not proper consideration of the Comptroller in issuing certificates to new banks. They argue that the vast majority of judicial authority is on the subject of establishing branch banks. 21 U.S.C. § 36, which section sets forth the law on that subject, provides that all factors relevant to the establishment of state branch banks must be considered by the Comptroller. The laws of the State of South Carolina and many other states specify that the needs of the community shall be considered in establishing branch banks. Therefore, with regard to branch banks, need must be considered by the Comptroller.

Plaintiffs argue that 12 U.S.C. §§ 21–27, which sections control the establishment of new national banks, make no mention of state regulations or of need. Rather 12 U.S.C. § 26 provides:

---

[3] The court notes that the defendant set forth further grounds in his affidavit, and, considering the affidavit of plaintiffs' representative submitted in this action, can understand plaintiffs' dismay at the additional grounds stated in the defendant's affidavit. The court is of the opinion that, if there is sufficient basis for the defendant's denial of the certificate on the originally stated ground, the additional facts stated in the allegedly "canned" affidavit can neither benefit nor harm plaintiffs.

Comptroller to determine if association can commence business.

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that at least 50 per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

12 U.S.C. § 27 provides:

Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the pro-

> visions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.

This court has difficulty in seeing language in those sections giving the Comptroller discretion in granting the certificate if the specific requirements of the act are met. The plaintiffs cite one case in a district court which may be authority for their argument. (*Olsen* v. *Camp* (C.A. #31804, E.D. Mich. Jan. 1970)).

The statutory language, which the defendant contends makes the need of the new bank a proper consideration and commits the determination of that need to the Comptroller's discretion, does not impress the court. However, the court is impressed with the long and continued practice of the Comptroller of considering the need of the community. It is impressed with the necessity of that consideration if national banks are to be so regulated as to minimize bank failures with their accompanying effects on the total community. It is also impressed with the fact that the weight of authority accepts the consideration by the Comptroller of the need factor without question. In *Sterling National Bank of Davie* v. *Camp,* 431 F. 2d 514, 516 (5th Cir. 1970), the court stated:

> It has always been recognized that this legislation (speaking of the above quoted section) confers vast discretion on the Comptroller to approve or disapprove a new charter application.

Therefore, this court concludes that the need of the community for the new bank is a factor to be con-

sidered by the Comptroller on an application for a certificate for a new bank. In his determination of that question he must exercise his expertise and discretion.

Having reached the above set forth conclusions regarding plaintiffs' arguments, there remains only the question of whether plaintiffs are entitled to summary judgment on the administrative record before the court. The Court of Appeals for the Fourth Circuit, on its last occasion to express itself regarding the scope of review on appeals from determinations of the Comptroller, stated: "We conclude that the scope of review should not be more rigorous than the substantial evidence rule." *First-Citizens Bank & Trust Co.* v. *Camp,* 409 F.2d 1086, 1095 (4th Cir. 1969).

Although acknowledging that plaintiffs presented a convincing case in favor of the establishment of their bank, the court cannot say that the conclusion of the Comptroller is not adequately supported under the substantial evidence rule. The two examiners who conducted field investigations, the Chief Examiner of the South Carolina Bank Control Board, and the first vice-president of the Federal Reserve Bank in Richmond all recommended that the application be denied. The statistics submitted on existent banking facilities in the area and the economic growth of the area are subject both to the interpretation given by the plaintiffs and to that of defendant. The court does not think more detailed discussion of the quite lengthy record would be constructive. It is of the opinion, after reading from the record, that although the Comptroller may have erred, there is substantial basis for his determination, and that it was neither capricious nor arbitrary.

Therefore, summary judgment must be entered for the defendant.

And it is so *ordered.*

ROBERT W. HEMPHILL,
United States District Judge.
Columbia, South Carolina,

COLUMBIA, SOUTH CAROLINA,
August 17, 1971.

A true copy:

MILLER C. FOSTER, Jr., *Clerk.*
By STELLA WALTERS,
Deputy Clerk.

APPENDIX C

JUDGMENT

United States Court of Appeals for the Fourth Circuit

No. 71-1965

F. W. PITTS, G. GRAHAM SEGARS, MARION M. GANDY, ROBERT K. BASS, WALTER G. WOFFORD, GUS HOFFMEYER, A. T. J. MORRISON, HARRELL L. GARDNER, AND EDWARD E. SALEEBY, PROPOSED ORGANIZERS OF THE FIRST NATIONAL BANK OF HARTSVILLE, A NATIONAL BANKING ASSOCIATION IN THE PROCESS OF FORMATION, APPELLANTS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, APPELLEE

APPEAL FROM the United States District Court for the District of South Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the ---------- ------ District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, *vacated*. The case is remanded to the United States District Court for the District of South Carolina, at Florence, for further proceedings consistent with the opinion of this Court filed herewith.

Filed June 28, 1972.

SAMUEL W. PHILLIPS, *Clerk*.

APPENDIX D

United States Court of Appeals
for the Fourth Circuit

No. 71-1965

F. W. PITTS ET AL., APPELLANTS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, APPELLEE

ORDER DENYING REHEARING

Upon consideration of the petition of the appellee, WILLIAM B. CAMP, Comptroller of the Currency of the United States, for a rehearing by the original panel of the court and a rehearing en banc, and the panel being of the opinion to deny a rehearing and no judge of the court requesting an en banc rehearing, it is

ORDERED that the said petition be, and it is hereby, *denied.*

ALBERT V. BRYAN,
United States Circuit Judge.

JOHN D. BUTZNER, Jr.,
United States Circuit Judge.

JOHN A. FIELD, Jr.,
United States Circuit Judge.

A True Copy, Teste:

SAMUEL W. PHILLIPS,
Clerk.

By VIRGINIA LIPFORD,
Deputy Clerk.

Filed August 30, 1972.

SAMUEL W. PHILLIPS, *Clerk.*

APPENDIX E

Section 17 of the National Bank Act, Act of June 3, 1864, c. 106, 13 Stat. 104, R.S. 5168, as amended, codified in 12 U.S.C. 26, provides:

> *Comptroller to determine if association can commence business*
>
> Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

Sections 12 and 18 of the National Bank Act, Act of June 3, 1864, c. 106, 13 Stat. 102 and 104, R.S. 5169, codified in 12 U.S.C. 27 provide:

Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.

The Administrative Procedure Act, 5 U.S.C. 500–706, provides in relevant part:

§ *554. Adjudications*

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearings.

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted. When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the

disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Comptroller of the Currency's Regulation at the pertinent time, published at 29 Fed. Reg. 7413, June 9, 1964, codified in 12 C.F.R. (1967 rev.) 4.2(a), (b), (c), (d), and (e) provides in part:

Organization of national bank.

(a) Application. Persons desiring to organize a national bank should submit to the Regional Comptroller of the Currency for the region in which the proposed bank is to be located, an "Application to Organize a National Bank." This application, supplementary forms, and instructions for their preparation and filing are furnished upon request submitted to the Comptroller of the Currency or to the Regional Comptroller.

(b) Investigation. The Comptroller of the Currency may conduct such investigation as he deems

necessary or proper. Matters investigated include:

(1) The adequacy of the proposed bank's capital structure.

(2) The earning prospects of the proposed bank.

(3) The convenience and needs of the community to be served by the proposed bank.

(4) The character and general standing in the community of the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.

(5) The banking ability and experience of proposed officers and other employees.

If the persons referred to in subparagraph (4) of this paragraph are not ready within 30 days after filing of the application, to submit to and cooperate in the investigation, the Comptroller may treat the application as abandoned.

(c) Preliminary approval. The Comptroller of the Currency determines whether or not preliminary approval of the application should be granted. If preliminary approval is granted, the Comptroller may, if he determines that such action is necessary or desirable for the protection of the public interest, at any time withdraw such approval or provide that final approval shall be subject to the fulfillment of conditions specified by him.

(d) Corporate organization. If preliminary approval is granted, the applicants are furnished with suggested forms of documents necessary for the corporate organization of a national banking association and instructions for their preparation and filing. The proposed bank does not become a body corporate until certain of these documents have been accepted for filing by the Comptroller of the Currency.

(e) Commencement of business. The Comptroller of the Currency determines whether or not the national banking association is entitled to commence the business of banking. If the Comptroller's determination is favorable, he issues a certificate, known as a charter, which provides that the national banking association is authorized to commence the business of banking.

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